Supreme Court U.S.
FILED
MAR 21 2002
OFFICE OF THE CLERK

No. 01-1349

In The

Supreme Court of the United States

POTOMAC CORPORATION,

Petitioner,

v.

TROY SWINTON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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I. STATEMENT OF THE CASE

The Plaintiff, Troy Swinton, brought suit against the Petitioner, the Potomac Corporation, d/b/a U.S. Mat, for racial harassment and constructive discharge from employment. He alleged a violation of 42 U.S.C. § 1981, a violation of the Washington Law Against Discrimination, RCW 49.60 *et seq.*, and a state common law claim of outrage. The claim of outrage was dismissed at summary judgment, and the remaining claims went to trial in the District Court of the Western District of Washington. The jury returned a verdict of $5,621 in back pay; $30,000 for emotional distress; and $1 million in punitive damages. The judgment was entered on August 19, 1999. The Defendant appealed on numerous grounds. The Ninth Circuit affirmed on all grounds. *See Swinton v. Potomac Corporation,* 270 F.3d 794 (9th Cir. 2001). Petitioner Appendix [hereinafter Pet. App.]

The Plaintiff, Troy Swinton, was employed in the Defendant's shipping department from August, 1996, until February, 1997. He was the only African American of approximately 140 employees. Pet. App. at 6. Mr. Swinton testified that the racial jokes and slurs started a couple of days after he started working there, and that sometimes this would happen a couple of times a day and several times a week. Record 116:16-21. Mr. Swinton heard the term "nigger" used more than 50 times while employed by the Defendant. Pet. App. at 7-8. He also heard the term "boy" and "gook." Record 123:3-7; 128:10-20. He heard these terms used by both supervisors and co-workers. *Id.* Plaintiff also heard numerous jokes and negative comments about Polish people, Jewish people and gay people. Record 128:23-129:2. Many of the so

called "jokes" (but not all) are reported in the Ninth Circuit's opinion. Pet. App. at 6-7.

Pat Stewart was Plaintiff's immediate supervisor. Pet. App. at 6. Stewart testified that he heard racial slurs and jokes and comments while working at U.S. Mat about once a week in Swinton's presence. Record 271:22-273:5; 270:23-271:2. Stewart admits that he [Stewart] told racial jokes approximately 2-3 times. Record 273:19-23. He also heard one of the two Production Superintendents make racial jokes 2-3 times. Record 273:6-18; Pet. App. at 6-7. "Stewart admitted that although he had an obligation under company policy to report the racial harassment, he never made any such report and never told Fosdick [a supervisor with no immediate authority over Swinton] or anybody else to stop making such jokes." Pet. App. at 7.

Contrary to the representation of the Petitioner, the use of racial jokes and slurs was not limited to Jon Fosdick. Petition at 3. Racial jokes and slurs were also made by numerous co-workers in Swinton's presence. Pet. App. at 7. The jokes and slurs were ubiquitous. *Id.* A co-worker corroborated that "there were jokes about a wide variety of ethnic groups, including whites, Asians, Polish people, gays, Jews and Hispanics. Another testified that the majority of the people at U.S. Mat had actually witnessed the use of racially offensive language, and a third employee testified that 'just about everybody' at U.S. Mat had heard Fosdick [a supervisor from a different department] use racial slurs and comments." Pet. App. at 7. According to one co-worker, "the majority of employees who were employed at U.S. Mat made racial jokes, comments or slurs." Record 314:20-316:23. Not only is there substantial evidence to support the existence of a racially

hostile work environment, the pervasiveness of the racially hostile work environment is not rebutted.

It is undisputed that Swinton did not complain about the racially hostile environment. He didn't complain to his immediate supervisor, Pat Stewart, because Stewart already knew – he witnessed the jokes and laughed along. He didn't complain to the President, the alternative person designated by the employer's policy, because he didn't know the identity of the President. Pet. App. at 9. Swinton's reactions to the racially derogatory comments included glaring and walking away, and remarking to a co-worker that the jokes were "f***ed up." Swinton didn't ask Fosdick to stop because he knew that Fosdick regularly carried a .22 caliber pistol in his back pocket. Pet. App. at 8.

Swinton was constructively discharged. He didn't quit his job immediately because his fianceé was pregnant, and Swinton was the sole support. Finally, he quit on February 28, 1997, because he was "fed up with all the name-calling . . . he just couldn't take it anymore." Pet. App. at 8.

On March 7, 1997, Plaintiff filed an application for unemployment benefits with the Washington Employment Security Department indicating that he had quit on February 28, 1997. On the application form, Plaintiff referred to "racial slander" and "racial jokes daily by numerous people," and stated, "[e]veryday, from one person or another, a racial joke or comment was thrown my way, and I was sick and tired of it." Swinton identified several of the specific jokes about which he and others later testified at trial. He noted that he "didn't feel comfortable going to management because they already knew

about the problem and did nothing about it." Pet. App. at 9-10.

The State of Washington notified U.S. Mat of Swinton's allegations of racial harassment on or about April 17, 1997.[1] After receiving the unemployment compensation papers, the Human Resource Manager, Vickie Thompson, started an investigation. Pet. App. at 10. The investigation that she did in reference to Swinton was the first investigation that she had ever done concerning harassment or discrimination matters. Record 210:21-211:1. As part of the investigation, the Human Resources Manager interviewed Stewart, the Plant Co-Managers, and the President. All denied that they had witnessed harassment. Pet. App. at 10. Although a co-worker, Maloney, was mentioned in the unemployment compensation application as a harasser, the HR Manager didn't speak to Maloney. Record 222:21-25. Despite the fact that the HR Manager knew how to contact him, no effort was made to interview Swinton. Record 219:25-220:10. Nothing more was done until Plaintiff filed a lawsuit.

After the lawsuit was filed in July, 1997, the HR Manager interviewed more of Swinton's co-workers. Pet. App. at 10. All co-workers acknowledged the existence of racial joking. Record 239:22-25; 234:18-20; 230:19-231:7. In all of her interviews concerning Swinton, Thompson didn't ask anyone for how long a period of time the racial jokes had been going on, how frequently the racial jokes

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[1] The Ninth Circuit opinion actually says April 17, 1999. Pet. App. at 10. As can be readily discerned from the context of the opinion, this is a misprint.

had been told, or the specifics of what racial jokes or slurs were being used. Record 242:11-243:1; 240:18-242:10; 235:16-237:4; 232:20-234:7. According to Thompson, "a racial joke is a racial joke. I didn't need to know what it was." Record 233:2-4. The specific comments or jokes were "not important." Record 236. Thompson admitted that no disciplinary action has been taken against anyone at U.S. Mat for making racial comments or jokes. Record 211:11-14.

"In September of 1997, in apparent response to Swinton's charges, U.S. Mat had all of its supervisors and managers undergo training for the identification and prevention of harassment. No one at U.S. Mat was disciplined for the use of, or toleration of, offensive racial language." Pet. App. at 10.

II. SUMMARY OF ARGUMENT

The questions presented by the Petitioner address the availability of a negligence claim for co-worker harassment under 42 U.S.C. § 1981 and the admissibility of post-occurrence remediation on the issue of punitive damages. In reference to the negligence claim, the Petitioner asserts that there exists a split in the circuits. This is plain error. In support of its assertion that there exists a split in the circuits, the Petitioner cites a case from the Eleventh Circuit Court of Appeals which was vacated and withdrawn approximately two months later. Petitioner also cites an *unpublished* opinion from the Fourth Circuit Court of Appeals which is consistent with the Ninth Circuit's ruling in this case. All circuits that have reviewed the question have ruled that negligence is the

proper standard of liability for co-worker harassment. These rulings are consistent with the rulings of this Court.

The admissibility of post-occurrence remediation is reviewed under an abuse of discretion standard. There was no abuse of discretion in this case. Neither question presented for review satisfies any of the considerations governing review on certiorari. *See* Supreme Court Rule 10.

III. ARGUMENT OF COUNSEL

A. There Is No Split In The Circuits On The Availability Of A Claim For Negligence For Co-Worker Harassment.

The Petitioner asserts that there exists a split in the circuits concerning the availability of a claim for negligence for co-worker harassment. This assertion is superficially without merit. All circuits that have addressed the issue either directly or indirectly acknowledge that an employee can establish liability for co-worker harassment where the employer knew or should have known of the harassment and failed to take prompt remedial action. This issue satisfies none of the considerations governing review on certiorari. *See* Supreme Court Rule 10.

1. *Coates v. Sundor Brands, Inc.*, 160 F.3d 688 (11th Cir. 1998) Has Been Vacated And Withdrawn By The Eleventh Circuit.

The Petitioner cites *Coates v. Sundor Brands, Inc.*, 160 F.3d 688 (11th Cir. 1998), for the proposition that a theory

of negligence cannot be applied to co-worker harassment "where the plaintiff alleged that management knew of the co-worker harassment but nevertheless failed to take reasonable steps to correct it." Petition at 7. Petitioner quotes at length from the opinion and refers to it repeatedly. Petitioner neglects to mention, however, that this opinion has been vacated and withdrawn. *Coates v. Sundor Brands, Inc.*, 164 F.3d 1361 (11th Cir. 1999). None of the language relied upon by the Petitioner appears in the substituted opinion. In the substituted opinion, the Court omits any mention of vicarious liability, the theory of negligence or the Supreme Court's ruling in *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998). In the Conclusion of the opinion, the Court states: "When an employee's ability to perform his or her job is compromised by discriminatory acts including sexual harassment and the employer knows it, it is the employer that has the ability, and therefore the responsibility, to address the problem, whether the harasser is a supervisor, a co-worker, a client, or a subordinate." *Id.* at 1366. Clearly, the Eleventh Circuit corrected its prior misunderstanding of the applicable law.

2. *Ocheltree v. Scollon Productions, Inc.*, 161 F.3d 3 (4th Cir. 1998) Has No Precedential Value And Acknowledges A Theory Of Negligence For Co-Worker Harassment.

As stated by the Petitioner, *Ocheltree v. Scollon Productions, Inc.*, 161 F.3d 3 (4th Cir. 1998), is an unpublished opinion. Petition at 8. Unpublished opinions are not binding precedent in the Fourth Circuit Court of Appeals. *See* Fourth Circuit Local Rule 36(c).

Petitioner quotes from *Ocheltree* as follows: "the Supreme Court disregarded the actual or constructive knowledge element [of a negligence claim] and held that '[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee.' " *See* Petition at 8. The Petitioner fails to mention, however, that at the conclusion of the quoted language the Court inserts a footnote. Footnote number 1 reads as follows: "The Supreme Court did not address the extent to which an employer may be vicariously liable for actionable conduct caused by a nonsupervisor (sic). Presumably, in those instances, a plaintiff must still show actual or constructive knowledge." *Id.* at fn 1. The language omitted by the Petitioner reveals that in its unpublished opinion the Fourth Circuit recognizes that the theory of negligence still applies to actionable conduct by a non-supervisor or supervisor without immediate or successively higher authority.

B. The Application Of A Negligence Theory For Co-Worker Harassment Is Not In Conflict With Any Supreme Court Decision.

The Supreme Court has ruled that the employer is vicariously liable for the harassment of a supervisor with immediate or successively higher authority. In the absence of tangible employment action, the Court created a two prong affirmative defense; that the "employer exercised reasonable care to prevent and correct promptly" harassing behavior *and* that the employee was "unreasonable" in failing to complain. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, 2270, 141 L.Ed.2d 633

(1998) and *Faragher*, 524 U.S. at 807, 118 S.Ct. at 2292-93. The affirmative defense is limited to cases seeking vicarious employer liability for conduct by a supervisor with immediate authority or above. In reference to co-worker harassment, a negligence theory continues to apply where management either knew or should have known of the harassment and failed to stop it.

> [A]n employer can be liable, nonetheless, where its own negligence is a cause of the harassment. An employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it. Negligence sets a minimum standard for employer liability under Title VII, but Ellerth seeks to invoke the more stringent standard of vicarious liability.

Ellerth, supra at 759. A finding that the employer knew or should have known of the harassment and failed to take prompt remedial action forecloses a finding of reasonable care to prevent or correct harassment as an affirmative defense. The two findings are entirely inconsistent.

The Petitioner argues that "employers can face higher exposure for co-worker harassment than for supervisor harassment. Employers should not have fewer defenses in co-worker cases, when the basis for their liability is more attenuated." Petition at 17. As explained by the Ninth Circuit, "this reasoning rests on the faulty premise that an employer is 'better off' in the strict liability context than the negligence context." Pet. App. at 14. Reasonable care is an essential element of both the employer's affirmative defense and the employee's claim

of negligence. As an affirmative defense, the employer has the burden of proving that it did exercise reasonable care. To establish negligence, the employee has the burden of proving that the employer failed to exercise reasonable care. In both instances, the lack of reasonable care is at issue. The only difference is the allocation of the burden of proof. "[T]he chief difference is that in the negligence context, the plaintiff bears the burden of proving the employer's failure to respond adequately to the harassment, while, in a vicarious liability regime, the defendant must establish the corrective action as an affirmative defense." Pet. App. at 14-15. Under either theory, liability turns on the question of negligence.

Pat Stewart, Plaintiff's immediate manager, was designated as the company official to receive allegations of harassment. He admitted that he tolerated the harassment; that he had an obligation to report all harassment; and that he failed to do so. This, as a matter of law, constitutes a lack of reasonable care. As explained by the Ninth Circuit, for the purposes of imputing knowledge to the employer an employee is a "manager" if "he 'has an official or strong de facto duty to act as a conduit to management for complaints about work conditions.' " Pet. App. at 16. *See also Wilson v. Tulsa Junior College*, 164 F.3d 534, 541-42 (10th Cir. 1998) ("[A] procedure that does not require a supervisor who has knowledge of an incident of sexual harassment to report that information to those who are in a position to take action falls short of that which might absolve an employer of liability"); *Hurley v. Atlantic City Police Dept.*, 174 F.3d 95, 118 (3rd Cir. 1999) ("liability established because 'a supervisor with the duty to stop harassment, was aware of much of

the harassment, even that which he did not himself inflict' "); *Mockler v. Multnomah County*, 140 F.3d 808, 812 (9th Cir. 1998) ("when 'the employer's supervisory personnel manifest[ ] unmistakable acquiescence in or approval of the harassment, the burden on the employer seeking to avoid liability is especially heavy' "). The Petitioner cites six additional cases supporting this theory of negligence. *See* Petition at 11.

Although the Ninth Circuit relied upon the actual knowledge of Plaintiff's immediate supervisor as a source of negligence, knowledge of the racially hostile environment was also constructive. The racial jokes and slurs were ubiquitous. The evidence established that Plaintiff was harassed by numerous co-workers and supervisors (managers). The majority of the employees told racial jokes on a daily basis. The pervasiveness of the racial harassment in this case is of such a magnitude that the failure to have actual knowledge can only be explained by negligence rising to the level of deliberate indifference. There is more than substantial evidence to support a finding that management knew or should have known and failed to take prompt remedial action. This is sufficient to establish liability under a theory of either vicarious liability or negligence because under either theory there existed a lack of reasonable care.

In addition to the above, the evidence clearly supports a finding that the Petitioner failed to exercise reasonable care in the investigation eventually conducted. The HR Manager acknowledges that she didn't inquire about the frequency or duration of the racial "joking," and didn't inquire about the specifics of which racial comments were said. *See Faragher*, 524 U.S. at 787-788,

118 S.Ct. at 2283 ("We directed courts to determine whether an environment is sufficiently abusive by 'looking at all the circumstances,' including the 'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance' ") (*citing Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993)). The HR Manager also failed to interview one of the harassers specifically mentioned in the unemployment compensation application, and made no effort to speak with Plaintiff. Despite the ubiquity of the racial slurs and jokes, no one employed by the Petitioner was disciplined in any way.

Quoting *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), the Petitioner argues that "employers are not always automatically liable for sexual harassment by their supervisors." Petition at 12. But in this case, liability was not predicated on the harassment of supervisors with immediate authority over Plaintiff. It was predicated on the harassment by a supervisor (Fosdick) *without* immediate authority over Plaintiff, and by many co-workers. Nothing in the Ninth Circuit's decision establishes automatic liability. It merely reaffirms that where an employer has knowledge or should have knowledge of a racially hostile environment and fails to take remedial action, the employer is liable. This is exactly the standard articulated in *Burlington Industries, Inc. v. Ellerth, supra* at 759. In effect, the Petitioner is asking this Court to eliminate the necessity of reasonable care from the liability equation. This request is unsupported by any authority, contrary to existing law, and must be rejected.

C. The Admissibility Of Post-Occurrence Remediation On The Issue Of Punitive Damages Is Discretionary With The Trial Court. There Was No Abuse Of Discretion.

This Court has held that abuse of discretion is the proper standard of review of a district court's evidentiary rulings. *Old Chief v. United States*, 519 U.S. 172, 174 fn 1 (1997); *United States v. Abel*, 469 U.S. 45, 54 (1984). In order to reverse, an appellate court must find the trial court's ruling was manifestly erroneous. *Spring Co. v. Edgar*, 99 U.S. 645, 658 (1879) ("cases arise where it is very much a matter of discretion with the court whether to receive or exclude the evidence; but the appellate court will not reverse in such a case, unless the ruling is manifestly erroneous"). The exclusion of post-occurrence remediation in this case was not manifestly erroneous.

The Petitioner argues that evidence of post-occurrence remediation is always admissible regardless of the circumstances. The Ninth Circuit analyzed this issue with great care. *See* Pet. App. at 29-39. The Court correctly ruled that the admissibility of such evidence is discretionary with the trial court, and that the exclusion of the evidence in this case was not an abuse of discretion. This issue satisfies none of the considerations governing review on certiorari. *See* Supreme Court Rule 10.

A long line of cases establishes that evidence of post-occurrence remediation is not admissible for the purpose of proving the lack of discrimination. *Lam v. University of Hawaii*, 40 F.3d 1551, 1567 fn 17 (9th Cir. 1994) ("Given the obvious incentive in such circumstances for an employer to take corrective action in an attempt to shield itself from

liability, it is clear that nondiscriminatory employer actions occurring subsequent to the filing of a discrimination complaint will rarely even be relevant as circumstantial evidence in favor of the employer"); *Bouman v. Block*, 940 F.2d 1211, 1227 (9th Cir. 1991) ("We have recognized that '[l]ooking at the [employer's] record of performance after the courts have been asked to intervene is irrelevant to the merits of a discrimination claim and can be highly misleading' "). The reasoning of this line of cases is instructive. In *Gonzales v. Police Dept., City of San Jose, Cal.*, 901 F.2d 758 (9th Cir. 1990), the Court explained that " 'research leads us to conclude that often the acts relied upon as evidencing good faith are taken in response to the lawsuit filed by the discriminatee. Such actions in the face of litigation are equivocal in purpose, motive and permanence.' " *Id.* at 762.

Still other cases establish that such evidence is not admissible for the purpose of defeating a claim for injunctive relief. These Courts recognize that "protestations or repentance and reform timed to anticipate or blunt the force of a lawsuit offer insufficient assurance that the practices sought to be enjoined will not be repeated." *Davis v. County of Los Angeles*, 566 F.2d 1334, 1343 (9th Cir. 1977); *Rowe v. General Motors Corp.*, 457 F.2d 348, 359 (5th Cir. 1972) (same); *James v. Stockham Values and Fittings*, 559 F.2d 310, 354-355 (5th Cir. 1977) (same); *Cypress v. Newport News General & Nonsectarian Hospital Ass'n*, 375 F.2d 648, 658 (4th Cir. 1967) (same); *Thompson v. Boyle*, 499 F.Supp. 1147, 1168 (D.C. 1980) (same); *Spencer v. General Electric*, 703 F.Supp. 466, 470 fn 12 (E.D. Va. 1989) (same). Because the injunction line of cases, like cases involving punitive damages, concern deterring future

misconduct, their reasoning should have persuasive force. Evidence of post-occurrence remediation inadmissible to prevent injunctive relief should be inadmissible to prevent punitive damages.

After reviewing the case law and academic commentary, the Ninth Circuit discovered some cases that "have taken the view that such evidence [post-occurrence remediation] is almost never relevant in assessing punitive damages." Pet. App. at 32. The courts reasoned that such evidence "is more likely to be motivated by a desire to mitigate punitive damages than by genuine contrition." *Id.* at 33. But the Ninth Circuit was not convinced that a *per se* rule of exclusion was justified. Pet. App. at 29-30. The Ninth Circuit also discovered some cases that favored admissibility. But the Ninth Circuit rejected the Petitioner's suggestion that such evidence is always admissible: "We do not, however, read the cases as necessarily establishing the bright-line rule Potomac urges." *Id.* at 31. The Ninth Circuit declined to endorse, within the context of employment discrimination, either view "that such evidence is always relevant, or that it is always irrelevant." *Id.* at 34. Rather, admissibility is discretionary with the trial court. *Id.* at 35.

The Ninth Circuit offered thoughtful guidance on this issue. It recognized that employers should be encouraged to institute anti-harassment measures, and must be given the opportunity to present evidence of such efforts in the appropriate circumstances. "The point is that the timing and nature of remedial action are case-specific and will not always fit in a neat box." *Id.* at 36. Where an employer learns of harassment almost immediately

before suit is filed, the exclusion of post-occurrence remediation will eliminate the employer's ability to prove that it took prompt remedial action as a defense to liability. Where, on the other hand, an employer has had a substantial opportunity to take remedial action, but has failed to do so until after a lawsuit is filed, the remedial action has less probative force and the motives for the remedial action are more suspect. Pet. App. at 36.

As applied to this case, management had actual or constructive knowledge of the racial harassment from the very outset of Plaintiff's employment. Indeed, the fact that he was the only African American in a work force of approximately 140 employees should have alerted management to the real potential for harassment and the immediate necessity for training. Instead, they waited until more than five months after receiving formal notice of the harassment and two months after Plaintiff filed suit.

> [T]he fact that all U.S. Mat supervisors and managers underwent anti-harassment training in September 1997, approximately seven months after Swinton quit, five months after he filed his unemployment claim alleging racial harassment, and two months after he filed suit . . . such evidence, if introduced, would have done little, if anything, to undermine the uncontroverted evidence that, even after everyone in management became fully cognizant of Swinton's allegations, no one – not Pat Stewart, none of those at U.S. Mat who had witnessed the harassment and done nothing about it, and none of the workers who had actually hurled the epithet "nigger" at Swinton – was ever fired, demoted, or any way disciplined.

Id. at 38. Under these circumstances, the exclusion of this evidence was not an abuse of discretion.

IV. CONCLUSION

The Petition for a Writ of Certiorari should be DENIED.

Respectfully submitted this 21st day of March, 2002.

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